Filed 12/17/08 Baez v. Super. Ct. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DANIELLE BAEZ, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; BURBANK UNIFIED SCHOOL DISTRICT, Real Party in Interest.	No. B208294 (Super. Ct. No. BC372092)

ORIGINAL PROCEEDINGS; application for a writ of mandate. Joanne O'Donnell, Judge. Petition for writ of mandate granted.

Law Offices of Victor L. George, Victor L. George and Wayne C. Smith for Petitioner.

No appearance for Respondent.

Doumanian & Associates and Nancy P. Doumanian for Real Party in Interest.

SUMMARY

The plaintiff sued her employer for discrimination, harassment and other claims. In its answer, the employer asserted a number of affirmative defenses based on the alleged adequacy of its attorney's investigation of the plaintiff's complaints. However, in response to the plaintiff's discovery requests directed at these affirmative defenses, the employer asserted objections on the basis of attorney-client privilege and the work product doctrine. The trial court denied the plaintiff's subsequent motion to compel production of the requested documents, and the plaintiff filed this writ petition. Under the facts of this case, consistent with *Wellpoint Health Networks, Inc. v. Superior Court* (*Wellpoint*) (1997) 59 Cal.App.4th 110 and *Kaiser Foundation Hospitals v. Superior Court* (*Kaiser*) (1998) 66 Cal.App.4th 1217, we conclude that the trial court erred.

FACTUAL AND PROCEDURAL SYNOPSIS

In December 2007, Danielle Baez filed a (first amended) complaint against the Burbank Unified School District and its Chief Facilities Officer Craig Jellison, alleging causes of action for discrimination, harassment and retaliation in violation of Government Code section 12940, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy. Beginning in December 2005, she alleged, Jellison began sending her suggestive and offensive e-mails and pursued her with the intention of starting an extramarital affair.[1] When Baez told Jellison his advances were unwelcome, he admitted he had been "an ass" and agreed to "back off." Days later, he propositioned her to spend the weekend with him in Lake Mead. She rejected him again. He continued sending increasingly graphic e-mails and making explicit propositions which she recounted in her complaint.

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[1] She said both she and Jellison were married.

When Baez turned Jellison down, she said, he would retaliate by refusing to cooperate with her in preparing necessary reports and projects. She tried to avoid Jellison but learned in the summer of 2006 he was attempting to switch her secretarial assignments and have her transferred to his department to work under his sole supervision and control. On July 26 at about 4:30 p.m., Jellison summoned Baez to his office, ostensibly to discuss her transfer, indicating her position would be reclassified so her pay would increase. After locking the door, he directed Baez to a chair near his desk, then suddenly pinned her there.[2] She described in detail how he sexually assaulted her before she was able to break away and run from the office. She said he also taunted her with an e-mail after the attack.

Thereafter, Baez alleged, "Jellison began spreading a rumor that [she] was involved in an improper relationship with her other supervisor, triggering an investigation by the Burbank Unified School District." Following her complaints of Jellison's sexual harassment and battery, she said, the District purported to undertake an investigation of these claims, demanding that she file a police report and provide the District with a copy. She filed a police report in March 2007. Although Jellison had been disciplined previously for other acts of harassment against other employees, the District did not discipline him after Baez's report and took no steps to insure he could not approach or come in contact with Baez at work. However, in retaliation for her complaints and in ratification of Jellison's conduct, the District took away Baez's notary stipend and refused to pay her overtime. As a result, she alleged, she was constructively terminated on March 20.

The District and Jellison filed their answer in which they asserted the following affirmative defenses (among others):

"[Baez's c]omplaint fails as a whole given that the . . . District *properly and timely investigated [her] complaints of harassment and discrimination* in the work[]place." (Italics added.)

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[2] Baez described Jellison as weighing 260 pounds.

"[Baez's c]omplaint as a whole is barred given that [Baez] engaged in misconduct in the work[]place in the form of an inappropriate sexual relationship with her supervisor Steve Bradley which resulted in an investigation and disciplinary action against [Baez] and her supervisor."

"[Baez's c]omplaint as a whole is barred given that the [District's] employment practices are lawsuit [sic] given that they are necessary to the function of its business. The purpose of the employment practice and selection policy is to operate the business safely and efficiently, and the employment practice and selection policy substantially accomplishes this business purpose."

"[Baez's c]omplaint as a whole is barred given that *[Baez] was never subjected to harassment or discrimination on the basis of her sex or gender; [Baez] was never subjected to unwanted harassing conduct; any harassing conduct was not severe or pervasive; [Baez] never considered the work environment to be hostile or abusive; no supervisor engaged in any harassing or abusing conduct of [Baez]*." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that Baez could have avoided all or some of the harm with reasonable effort; *in that [the District] took reasonable steps to prevent the harassment;* [Baez] unreasonably failed to use [the District's] harassment complaint procedures; that [sic] reasonable use of [the District's] procedures would have prevented some or all of [Baez's] alleged harm." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that *Baez was never subjected to unlawful or discriminatory employment practices and there is no evidence [the District] failed to take reasonable steps to prevent the harassment, retaliation or discrimination*." (Italics added.)

"[Baez's c]omplaint as a whole is barred given that *Baez never complained about any allegedly improper conduct or commentary by . . . Jellison at any time, and only raised this claim when she was the subject of an investigation for an inappropriate sexual relationship* between her and her supervisor Steve Bradley." (Italics added.)

Baez served the District with a request for production of documents, which included the following requests:

"Request No. 3:

"All 'writings' (as defined by Evidence Code [section] 250) evidencing any investigations related to complaints made by [Baez]. . . ."

"Request No. 25:

"All documents relating to any investigation regarding [Baez's] claims."

The District objected and refused to produce responsive documents. As to Request No. 3, the District said: "This request invades the attorney client privilege and attorney work product doctrine. Any investigation conducted was done by attorneys for the . . . District and/or at their direction." Similarly, as to Request No. 25, the District objected: "This request as phrased seeks to invade the attorney client privilege, attorney work product doctrine and public employee privacy rights under Government Code section 6254 as well as third party privacy rights."

When the dispute remained unresolved following efforts to meet and confer, Baez filed a motion to compel further responses to these requests, citing *Wellpoint*, *supra*, 59 Cal.App.4th 110, 128: "If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived."[3] In its opposition, the District argued

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[3] Baez also sought a further response to: "Request No. 23: "All documents relating to the Skelly Hearing of [Baez]. . . ." The District responded: "See [Baez's] personnel file. Upon receipt of authorization from [Baez, the District] will produce a copy of [Baez's] file." According to Baez's attorney, production of Baez's personnel file was "supposed to contain the investigative documents relating to [her] *Skelly* hearing." Baez argued: "Although Defendant produced the documents related to the formal *Skelly* hearing, none of the investigative file was produced. Defendants have again placed it in issue and concede it was undertaken as part of the investigation of [Baez's] sexual assault complaint. Moreover, it was conducted by the same investigator. Accordingly, those files should be produced for the same reasons . . . ."

that the decision in *Kaiser, supra,* 66 Cal.App.4th 1217, "limited the breadth of . . . *Wellpoint,*" *supra,* 59 Cal.App.4th 110. According to the District, under *Kaiser, supra,* 66 Cal.App.4th at page 1220, "the protections afforded by the law for communications between attorneys and their clients are not waived by the employer's pleading of the adequacy of its prelitigation investigation as a defense to [an] action for employee discrimination or harassment."

In support of its opposition, the District submitted a declaration from attorney Sukhi Sandhu. She said the District retained her to investigate allegations of an inappropriate sexual relationship between Baez and her supervisor Steve Bradley. During her initial interview of Baez in January 2007, Baez denied having had an inappropriate relationship with Bradley.[4] During a subsequent interview in February, she said, Baez told her for the first time she (Baez) had been subjected to sexual harassment by Jellison and Jellison sexually assaulted her on July 26, 2006. "Accordingly, [she] expanded the scope of her investigation to include Ms. Baez's allegations directed at . . . Jellison."

Sandhu further stated: "In addition to interviewing . . . Baez, . . . Bradley and . . . Jellison, I also interviewed other . . . District employees. As part of my investigative strategy, I chose which . . . District employees were to be interviewed. Consistent with my assurances that my discussions with witnesses would remain private and confidential to the extent permitted by law, the third party individuals I interviewed have an expectation of privacy relating to their identities and as to the information they provided to me. As part of my investigative strategy I also chose to review selected documents. I also prepared handwritten notes of my interviews of the witnesses and decided which information was important for me to memorialize in my notes. In addition, I prepared a written [r]eport to the Superintendent of the . . . District [Dr.

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[4] The District's return inappropriately commences with unsupported allegations regarding Baez and further devotes several additional pages to purported quotations from "salacious" e-mails it says Baez and Bradley exchanged.

Gregory Bowman] and the School Board which [collectively "the client"] contain[s] my thoughts, impressions, opinions, theories, analysis, and conclusions concerning the investigation into . . . Baez's allegations directed at . . . Jellison. This [r]eport was intended to be confidential and was to be relayed by me to the client only."

Sandhu's declaration concluded: "The portions of my investigative file materials which I understand to be part of the pending discovery dispute are: (1) [m]y work product in the form of my handwritten notes of my interviews of witnesses; and (2) [m]y confidential written [r]eport to the client."[5]

After oral argument, the trial court adopted its tentative ruling as its order and denied Baez's motion. "[Baez] has not met her burden of showing good cause to override the work-product doctrine and attorney-client privilege, which are still viable even in a situation where the employer asserts that it had conducted an adequate investigation. *Kaiser[, supra,]* 66 Cal.App.4th 1217, 1223. The declaration of Ms. Sandhu adequately demonstrates that the documents that she generated as part of her investigation concerning allegations of sexual impropriety between [Baez] and her supervisor constitute attorney work product and confidential client communications entitled to the protection of the attorney-client privilege. [Baez] also has not demonstrated a compelling interest that would justify invading the privacy rights of third parties."

Baez filed this petition for writ of mandate, directing the trial court to vacate its prior order and enter an order granting Baez's motion for production of the District's investigative file. We requested informal opposition and then issued an order to show cause why such relief should not be granted.

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[5] In a "privilege log" the District indicated that Sandhu was in possession of "[p]rivileged and [c]onfidential file materials relating to investigation conducted by . . . Sandhu attorney for . . . District."

DISCUSSION

Baez argues the trial court abused its discretion in denying her motion to compel the production of the District's investigative file. Consistent with both *Wellpoint, supra*, 59 Cal.App.4th 110, and *Kaiser, supra,* 66 Cal.App.4th 1217, we agree. The District's arguments that Sandhu's investigation should be protected by the attorney-client privilege and protected from disclosure under the work product doctrine miss the point, and its characterization of the *Kaiser* case is simply wrong.

In its discussion of the attorney-client privilege and work product doctrine, the *Wellpoint* court observed: "The sole exception . . . which the cases have recognized is under the waiver doctrine which has been held applicable to the work product rule as well as the attorney-client privilege." (*Wellpoint, supra,* 59 Cal.App.4th at p. 120, internal quotations and citation omitted.) "As our Supreme Court has held, waiver is established by a showing that 'the client has put the *otherwise* privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. . . .'" (*Id.* at p. 128, quoting *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40, further citation omitted, italics added.)

"If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived." (*Wellpoint, supra*, 59 Cal.App.4th at p. 128.) On the facts in *Wellpoint*, however, the court concluded assessment of whether such a waiver had occurred was premature as the action was at the demurrer stage; there was no operative complaint and defense strategy remained unclear. The plaintiff's subsequent amended complaint might not assert hostile work environment, focusing instead on discrimination and retaliation; and the defendant had not yet filed its answer so it was not

yet clear whether the defendant would "raise the defense of investigation and remedial action. . . . Only then, and only if defendants' answer or discovery responses indicate the possibility of a defense based on thorough investigation and appropriate corrective response, can a finding of waiver be made." (*Id.* at p. 129.)

Presented with "significantly different" facts, the court in *Kaiser, supra,* 66 Cal.App.4th 1217, 1225, discussed *Wellpoint* and its legal underpinnings at length. "The issue before this court is whether an employer which conducts an internal investigation into claimed employee misconduct, *and which later produces its nonprivileged investigation files in the course of litigation against it*, waives the protection of the attorney-client privilege or the attorney work product doctrine as to confidential communications *between the employer's nonattorney investigator and the employer's attorney* during the investigation. We must address this issue in light of the recent decision in *Wellpoint*, which addresses the question in the similar yet factually distinguishable context of an employer's internal prelitigation investigation conducted entirely by an attorney hired by the employer. (*Wellpoint*, *supra*, 59 Cal. App. 4th at pp. 114-119.) We conclude that, contrary to the interpretation for which plaintiffs argue and which the trial court accepted, *Wellpoint* does *not* hold that, once a defendant claims it has investigated a complaint of harassment and taken appropriate remedial action based on its own investigation, a plaintiff is entitled to discover *all* communications involving the employer's internal investigation, *whether or not the investigation was conducted by a nonattorney and regardless of the employer's invocation of the attorney-client privilege with respect to the nonattorney's confidential communications with the employer's counsel*."[6] (*Kaiser, supra,* 66 Cal.App.4th at pp. 1222-1223, initial italics in original, italics added to qualifying language.)

"In *Wellpoint*, the employer responded to the employee's original claims by undertaking an investigation. However, rather than carrying out the investigation itself through in-house personnel, the employer hired a law firm to perform the investigation on

its behalf. An attorney from the law firm then sent the employee a letter rejecting his claims of racial discrimination, and stating that '"each charge . . ."' made by the employee had '". . . been fully investigated and taken seriously."' (*Wellpoint, supra,* 59 Cal. App. 4th at p. 117.) After the employee filed suit and sought discovery of the investigation files, the employer claimed the entire investigation was protected by the attorney-client privilege and the work product doctrine because the investigator happened also to be legal counsel. (*Id*. at pp. 117-118.) On these facts, the *Wellpoint* court concluded that should the employer raise the defense of adequate investigation, it could not then hide behind the privilege to keep the entire investigation secret. (*Id*. at pp. 125-129.)

"The facts of the instant case are significantly different. Here, Kaiser's investigation was performed by a nonattorney human resources specialist. When plaintiffs requested discovery of Kaiser's investigation files, Kaiser produced over 90 percent of its investigation-related documents after obtaining a *written stipulation* that such production did *not* constitute a waiver of the attorney-client privilege, and withheld or partially redacted only 38 pages of documents (just under 10 percent of the whole) under the attorney-client privilege or the work product doctrine. Kaiser also produced a privilege log describing the nature of each document withheld or redacted on grounds of the attorney-client privilege or attorney work product doctrine. Thus, unlike the situation in *Wellpoint,* Kaiser has never denied the plaintiffs any discovery of its investigation files on the claim its entire investigation is protected under the attorney-client privilege or work product doctrine. To the contrary, it has already produced all nonprivileged documents and communications related to its investigation of plaintiffs' claims. Kaiser's only assertions of privilege relate to specified communications between its employees and legal counsel." (*Kaiser, supra,* 66 Cal.App.4th at p. 1225, further internal quotations omitted.)

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[6] The District omitted the italicized qualifying language in its repeated quotation of this passage from *Kaiser.*

The *Kaiser* court continued: "[T]he *Wellpoint* court specifically rejected 'a blanket rule excluding attorney investigations of employer discrimination from attorney-client and work product protection . . . .' [Citations.] The court went on explicitly to allow for particularized 'analyses of individual documents containing attorney-client communications or purported work product to determine whether the dominant purpose behind each was or was not the furtherance of the attorney-client relationship,' recognizing that 'even though an attorney is hired to conduct business affairs, he or she may be called on to give legal advice during the course of the representation, and documents related to those communications should be protected notwithstanding the original purpose of employing the attorney.' (*Wellpoint*, supra, 59 Cal. App. 4th at p. 122.) On this basis, the *Wellpoint* court concluded the trial court in that case 'should not have given [the employee] carte blanche access to [the employer's] investigative file, *but should have based its ruling on the subject matter of each document.*' (*Ibid*., italics added [by *Kaiser*].)

"Subsequently, in discussing the employee's alternative contention that the employer had waived any existing attorney-client or work product protections by raising the adequacy of its investigation as a defense to his claims, the *Wellpoint* court expressly stated the position it was adopting as follows: '[T]he employer's injection into the lawsuit of an issue concerning the adequacy of the investigation *where the investigation was undertaken by an attorney or law firm* must result in waiver of the attorney-client privilege and work product doctrine. . . . As our Supreme Court has held, waiver is established by a showing that "the client has put the otherwise privileged communication *directly at issue* and that disclosure is *essential* for a fair adjudication of the action. [Citations.] (*Wellpoint, supra*, 59 Cal. App. 4th at p. 128, italics added [by *Kaiser*].) Thus, the *Wellpoint* court was careful to specify that its concern was with the circumstances before it, in which the investigation performed by the employer's *attorney* was the *only* investigation cited as a defense to the employee's charges, and at the same time was claimed to be completely privileged in its entirety. Under these specific circumstances, the employer had clearly put 'directly at issue' otherwise privileged

communications whose disclosure was 'essential for a fair adjudication of the action.'" (*Kaiser, supra,* 66 Cal.App.4th at pp. 1225-1226, original italics.)

We see no difficulty with reconciling these two cases. Where, as in *Kaiser*, "a defendant has produced its files and disclosed the substance of its internal investigation conducted by nonlawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action. [Citations.] . . . Kaiser performed a prelitigation in-house investigation through a nonlawyer human resources specialist and then produced its entire investigation file in discovery, only claiming attorney-client or work product protection of certain specified documents consisting of attorney-client communications." (*Kaiser, supra,* 66 Cal.App.4th at p. 1227.)

In this case as in *Wellpoint,* however, the District has put "'otherwise privileged communication *directly at issue* and that disclosure is *essential* for a fair adjudication of the action.'" (*Kaiser, supra,* 66 Cal.App.4th at p. 1226, original italics, citations omitted.) Again, the "*Wellpoint* court was careful to specify that its concern was with the circumstances before it, in which the investigation performed by the employer's *attorney* was the *only* investigation cited as a defense to the employee's charges, and at the same time was claimed to be completely privileged in its entirety. Under these specific circumstances, the employer had clearly put 'directly at issue' otherwise privileged communications whose disclosure was 'essential for a fair adjudication of the action.'" (*Ibid.*) For the same reasons, consistent with both *Wellpoint* and *Kaiser*, production of the investigative file is warranted in this case.[7]

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[7] The District's conclusory assertion that District employees had an expectation of privacy fails for this reason; Sandhu said she told them their communications were confidential to the extent permitted by law.

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate its prior order denying Baez's motion and to enter an order granting the motion.

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WOODS, J.

We concur:

PERLUSS, P.J.

JACKSON, J.